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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 28, 1905.

(19,687.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 20, 1905.

1 Court of Claims.

No. 21959.

HARRIET T. JAMES, Administratrix of Charles P. James, Deceased,
vs.
UNITED STATES.

1.—*Petition. Filed June* 30, 1900.

The petitioner, Harriet T. James, respectfully states:

1. She is a citizen of the United States and a resident of the city of Washington, D. C.

2. Her father was Charles P. James, late a citizen of the United States and a resident of the city and District aforesaid, who departed this life on the 9th day of August, 1899, leaving him surviving as his only next of kin and heirs-at-law two daughters, the petitioner, Harriet T. James, who is unmarried, and Edith James Wallach, the wife of Richard Wallach, Washington, D. C.

3. The petitioner was appointed on the 2d day of March, 1900, by the supreme court of the District of Columbia, sitting as an
2 orphans' court in and for said District, administratrix of her said father, and duly qualified as such. She presents herewith a copy of the letters of administration issued to her and prays that it be considered a part hereof, marking it "Petitioner's Exhibit A."

4. That said Charles P. James was on or about the 29th day of July, 1879, during the recess of the Congress, appointed by the President an associate judge of the supreme court of the District of Columbia, being a court of the United States, and forthwith qualified as such and entered upon the duties of his office, and upon the convening of the Congress in December of that year he was nominated by the President to said office, and, being confirmed by the Senate, qualified and entered upon the duties thereof upon the 17th day of December, 1879.

5. The said Charles P. James served continuously as such associate judge from the time of his appointment, as in the next preceding paragraph set forth, until on or about December 1, 1892, when he resigned his office, after having held his commission as such more than ten years and after having attained the age of more than seventy years, being at the date of such resignation in the seventy-fourth year of his age.

6. The petitioner is advised and informed, and so states the fact to be, that her said father was during the residue of his natural life entitled to receive the same salary which was by law payable to him at the time of his resignation.

7. She is further advised and informed, and so states the fact to

3 he, that the salary which was by law payable to him at the time of his resignation was the sum of five thousand dollars ($5,000) per annum, at which rate the Congress, by an act approved March 3, 1891, entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1892, and for other purposes" (26 S. L., p. 947), declared the chief justice of the supreme court of the District of Columbia and the five associate judges should be paid.

8. She is further advised and believes that for the year ending June 30, 1893, the said Charles P. James received a lesser salary, to wit, four thousand dollars ($4,000), than that to which he was legally entitled, to wit, five thousand dollars ($5,000), but that subsequently, in some manner to the petitioner not now known, but which if discovered she prays she may, if material, insert herein by way of amendment, such deficit for that year was paid to him, petitioner's intestate.

9. For the fiscal years subsequent to that ending June 30, 1893, to wit, 1893-'4, 1894-'5, 1895-'6, 1896-'7, 1897-'8, 1898-'9, and for the period of the fiscal year 1899-1900, between July 1, 1899, and the date of the death of the said Charles P. James, to wit, August 9, 1899, he, the said Charles P. James, was paid only at the rate of four thousand dollars ($4,000) per annum, although he was legally and equitably entitled to be paid at the rate of five thousand dollars ($5,000) per annum.

4 10. There was justly due and owing petitioner's intestate at the time of his death and there is now justly due and owing to the petitioner as his administratrix, after allowing all just credits and offsets, the sum of six thousand one hundred and seven dollars and seventy-five cents ($6,107.75), being the difference between the salary actually paid to him and the salary to which he was legally and rightfully entitled for the period of six years one month and nine days, as in the next preceding paragraph set forth.

11. Petitioner is further advised and so states that the claim in this her petition preferred is founded as well upon acts of Congress embodied in section 714 of the Revised Statutes of the United States, and the aforesaid act approved March 3, 1891, as upon the implied contract between the United States and petitioner's intestate arising from petitioner's intestate's acceptance and discharge of the office as judge of a court of the United States under the legislation above recited and the facts in this petition averred.

12. The petitioner further states that so far as she knows no action has been had on this claim, either in the Congress or by any of the departments of the United States; that she is the legal owner thereof, subject to the right of her said sister as one of the next of kin of said decedent; that there has been no assignment of the whole or any part thereof; that she is justly entitled to the amount claimed, after allowing all just claims and set-offs; that she and her said intestate have at all times borne true allegiance to the Government of the

United States, and have not in any way voluntarily aided, abetted, or given encouragement to a rebellion against the same.

13. The premises considered, the petitioner prays the award and judgment of this honorable court that she is, as administratrix of Charles P. James, deceased, entitled to have and recover of the United States the sum of $6,107.75 so as above demanded, and that such award and judgment may be duly made, enrolled, and executed; then she may have such other, further, and general relief as the nature of her case may require; and, as in duty, etc., she will ever pray, etc.

HARRIET T. JAMES,
Administratrix of Charles P. James, Deceased.

MORGAN H. BEACH,
Attorney-in-fact and Solicitor,
344 D Street N. W., Washington, D. C.

PETITIONER'S EXHIBIT A.

No. 9401, Administration Docket 26.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to all persons to whom these presents shall come, Greeting:

Know ye that on the 2d day of March, in the year of our Lord 1900, administration of all the goods, chattels, and credits of Charles P. James, late of the District of Columbia, deceased, was by the supreme court of the District of Columbia aforesaid granted and committed unto Harriet T. James, who, as administratrix of said deceased, first executed a bond to the United States, with good sureties approved by the said court, in the penalty of three hundred dollars, condition for the faithful performance of the trust in her reposed, she having taken the required oath, and whose appointment is unrevoked and still in force.

Witness Charles C. Cole, justice, holding the special term of the said supreme court for orphans' court business, this 29th day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Test:
[SEAL.]

GEO. E. JOHNSON,
Acting Register of Wills of the District of Columbia.

[U. S. int. rev. stamp, 10c., canceled.]

DISTRICT OF COLUMBIA, *ss:*

Before the undersigned this day personally appeared Harriet T. James, who, being first duly sworn, deposed and said that she has read the foregoing petition by her subscribed as administratrix of Charles P. James, deceased, and that she knows the contents thereof; that the matters and things therein stated as of her own knowledge are true and those stated upon information and belief she believes to be true.

HARRIET T. JAMES.

Subscribed and sworn to before me this 29th day of June, 1900.
[NOTARIAL SEAL.] CHARLES S. BUNDY,
Notary Public, D. C.

7 II.—*Amended Petition. Filed February* 4, 1903.

No. 21959.

HARRIET T. JAMES, Administratrix of Charles P. James, Deceased, Claimant.

vs.

THE UNITED STATES.

Comes now the claimant above named, by her attorney of record, and amends the petition by her heretofore filed herein, as follows, to-wit:

1. Strike out paragraph 10 in said petition, and in lieu thereof insert the following:

10. There was justly due and owing petitioner's interstate, at the time of his death, and there is now justly due and owing to the petitioner as his administratrix, after allowing all just credits and offsets, the sum of $6,688.90, being the difference between the salary actually paid to him and the salary to which he was legally and rightfully entitled for the period of six years eight months and eight days, to wit, from December 1, 1892, to August 9, 1899.

2. Amend paragraph 13 in said petition by striking out the sum for which judgment is therein prayed, to-wit, $6,107.75; and, in lieu thereof, insert the sum $6,688.90, as the amount for which judgment is prayed herein.

HARRIET T. JAMES,
Administratrix of Charles P. James, Deceased, Claimant.
By A. A. HOEHLING, JR.,
Attorney for Claimant.

III.—*Traverse. Filed February* 12, 1903.

the Court of Claims of the United States, December Term, A. D. 1904-5.

No. 21959.

HARRIET T. JAMES, Adm'x Chas. S. James,
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition and amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

IV.—*Argument and Submission.*

This cause was argued and submitted on the 12th day of February 1903.

V.—*Findings of Fact and Conclusion of Law. Filed May* 25, 1903.

HARRIET T. JAMES, Administratrix of the Estate of Charles P. James, Deceased,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact.

I.

Claimant is administratrix of Charles P. James, late a citizen of the United States and a resident of Washington, D. C., who departed this life August 9, 1899.

II.

Claimant's intestate was at one time an associate judge of the supreme court of the District of Columbia, which office he resigned December 1, 1892, after having held his commission more than ten years, and having attained the age of 74 years.

III.

His salary at the date of his appointment was $4,000 per annum, at which rate he was paid until July 1, 1891.

IV.

From July 1, 1891, to June 30, 1892, his salary was $5,000 per annum, and from June 30, 1892, to December 1, 1892, he was paid at the same rate.

V.

On his retirement he was paid, during the residue of his natural life, at the rate of only $4,000 per annum.

VI.

The period embraced in the claim herein is from December 1, 1892, to August 9, 1899, being six years eight months and eight days, at the rate of $1,000 per annum, aggregating the sum of $6,688.90.

Conclusion of Law.

Under the foregoing findings of fact, the court decides, as a conclusion of law, that the claimant's petition be, and the same is hereby dismissed.

10 VI.—*Opinion of the Court.*

HOWRY, *J.*, delivered the opinion of the court:

Plaintiff, as administratrix of the estate of the late Judge James, brings this action to recover the difference between the salary paid to him after his retirement as an associate justice of the supreme court of the District of Columbia and the salary which she claims should have been paid from the beginning of the judge's retirement to the period of his death. The claim is sought to be founded upon section 714 of the Revised Statutes, which provides as follows:

"When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years and having attained the age of 70 years, he shall, during the residue of his natural life, receive the salary which by law was payable to him at the time of his resignation."

Judge James resigned December 1, 1892, having held his commission more than ten years, and being then in the seventy-fourth year of his age. He died August 1, 1899. During his retirement he was paid at the rate of $4,000 per annum, besides a small sum hereinafter mentioned, while it is claimed he should have been paid at the rate of $5,000 per annum.

It is contended that the supreme court of the District of Columbia

is not one of the inferior courts established under that part of Section I of Article III of the Constitution, which declares that

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office."

By Section II this judicial power is extended to all cases in law and equity therein enumerated.

The contention ignores the constitutional guaranty of judicial independence arising from tenure of office and permanence in salary, and assumes that the supreme court of the District of Columbia is merely a legislative creation which Congress may abolish or change at will, without regard to incumbents, as in courts created for the Territories under a different article of the Constitution, from which it would result, if the contention be sound, that the supreme court of the District of Columbia is not a court of the United States within the meaning of section 714 of the Revised Statutes.

In *Embry v. Palmer* (107 U. S. R., 3) the Supreme Court of the United States designated the supreme court of the District of Columbia as a court of the United States. This would end the discussion did it clearly appear from the decision that the court meant to declare a difference between Territorial courts and courts provided for the seat of Government. In delivering the opinion, Mr. Justice Matthews said: "That the supreme court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress."

It is argued, however, that the designation meant a court of the United States in the same sense that a court established by Congress in a Territory with circuit or district court jurisdiction meant. And that whether such courts be established in a Territory or in the District of Columbia, neither can exercise any of the judicial powers enumerated in Section II of Article III of the Constitution, but that they can only exercise like powers.

Territorial courts are established under the general authority of Congress or by virtue of Section III of Article IV of the Constitution, which declares that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Defining the status of the two superior courts created by the act of March 30, 1822, for the establishment of a Territorial government in Florida, Chief Justice Marshall said they were not constitutional courts, but "legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." (*American Ins. Co. v. Canter*, 1 Pet., 511, 546.) But all the provi-

sions of the Constitution must be considered and construed together in determining whether in the organization and control of Territorial governments all acts, including those establishing judicial tribunals, were not designed for purposes of temporary government while other acts, under which permanent courts were expected or required to be provided, included the right to make these permanent judicial bodies the depositary of some part of the judicial powers conferred by the Constitution on the General Government.

Under section 8 of Article I of the Constitution, Congress have the power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States."

The 10 miles square that might by cession of particular States and the acceptance of Congress become the seat of government was meant by the framers of the Constitution to be as permanent as the States from whose boundaries the square was to be taken. The seat of government, unlike the territory acquired by conquest, treaty, and cession, was not to be donated or accepted as a transitory territorial boundary. It was a part of the constitutional scheme to provide for the perpetual use of enough territory free from State control to meet the demands of a permanent national seat of government. It would seem anomalous if the courts to be provided for the seat of government were not intended to be courts of the United States capable of receiving the judicial power provided by Article III as far as this judicial power could be made to apply and extend.

The legislation of Congress from the beginning of the Government to the present time is largely in keeping with the view that Congress have legislated upon the theory that the courts of the District of Columbia are permanent tribunals capable of receiving some part of the judicial power which can be conferred on courts in the District of Columbia as well as on courts of the United States in the States.

12 The judiciary act of 1789 included the area which later formed the District of Columbia. (1 Stats., 73.)

When, by the act of February 13, 1801 (2 Stats., 89), Congress passed an act to provide for the more convenient organization of the courts of the United States, the District of Columbia was included within a Federal district created by the act. By the act of February 27, 1801 (2 Stats., 103), entitled "An act concerning the District of Columbia," the laws then in force in the State of Virginia and in the State of Maryland were continued in force in that part of the District which had been ceded by those States. A separate circuit court for the District was made, in effect with all the powers of circuit courts and with judges of the same kind of tenure as provided for the court of the circuit from which the District was omitted. The District of Columbia was thus, to all intents and purposes, segregated as a single circuit from the other circuits and stood alone as a circuit court *sui generis*. It possessed most of the powers belonging to cir-

cuit and district courts of the United States and nearly all the jurisdiction that belonged to either of them, and also had some powers which belonged to neither of those courts.

The District of Columbia is within the meaning of the uniformity clause of the Constitution under the decision in the well-known case of *Loughborough v. Blake* (5 Wheat, 317). The District is a part of the United States for all purposes, domestic and international. It must continue so. Certain provisions of the Constitution, which apply only to the States as such, or to the citizens of the States as such, may not be operative in the District or to the citizens of the District, because the subjects to which they relate, or the conditions to which they apply, do not exist. Thus, citizens of the District of Columbia do not possess certain political rights that citizens of the States respectively have and enjoy. The constitutional right to bring a suit in a United States court against a citizen residing in any State of the Union is denied to a citizen here, because the District of Columbia is not a State within the meaning of that term as used in the Constitution. (*Hepburn v. Ellzey*, 2 Cranch, 445.) But the courts here have judicial power as permanent and lasting as elsewhere, and possess those subjects of jurisdiction which constitutionally are given to them. To be inferior courts under Article III they need not possess all the powers and subjects of jurisdiction precisely like every other court of the United States. The requisite jurisdiction is rightfully conferred if within the subjects of the jurisdiction so conferred classes of matter fall which the courts so created may rightfully entertain.

The complete and exclusive jurisdiction of Congress over the District is incompatible with the proposition that the District was intended to be organized for judicial purposes as foreign territory which Congress might dispose of, or as territory to be held so tentatively that the judicial power could not be lodged in tribunals as national in character as courts provided in those States which had ceded the District for national purposes forever. Territory acquired for the seat of government continues to be national. The rights of persons to their lives, liberty, and property are the same in the District as in the States, and the judicial powers of the supreme court, created for the District, are the same and are to be exercised at law and equity in the same manner for the protection of life and property as in the United States courts created for the States as near as may be.

13 But because the supreme court of the District of Columbia is vested with some powers not enumerated in Article III of the Constitution it is argued that they can not be constitutional courts like those provided for by section 714 of the Revised Statutes.

The proposition disregards the permanency intended by the organic law for any and all courts thereafter to be established at the seat of government. It ignores the design of the framers of the fundamental law to create a court of the United States at the capital, where the judicial power provided by Article III should be lodged most appropriately and as far as practicable during the existence of

the Government. Courts established for sections of the country pending the admission of such country as States imply the exercise of temporary functions which differentiate such tribunals from those whose powers imply continuity and permanence.

The proposition further ignores the right of Congress in the creation of courts under Article III to confer some of the judicial powers therein enumerated on certain of the inferior tribunals authorized to be established and other of the powers enumerated on certain other inferior tribunals authorized to be created by the same article. This court, for example, "is constituted one of those inferior courts which Congress authorizes" under Article III (*United States v. Klein*, 13 Wall., 145); but the jurisdiction it has of contracts between the Government and the citizen from which appeals may be taken directly to the Supreme Court is a larger jurisdiction than that conferred by the act of March 3, 1887 (24 Stats., 505), on other courts of the United States, as, by that act, the district and circuit courts of the United States are given concurrent jurisdiction with this court to a limited extent only of suits against the United States.

Various acts not necessary to notice were superseded by the judiciary reorganization act of March 3, 1863 (12 Stat., 762), by which enactment the present supreme court of the District of Columbia was established. The judges thereof (of whom there were four), one of whom was denominated "chief justice," were to be appointed by the President by and with the advice and consent of the Senate, and were to hold their offices "during good behavior." That is the phraseology of Section I of Article III. Their salaries were fixed, and subsequent statutes increased the number of judges and the amount of their compensation. Congressional, Departmental, and Executive construction since that time—a period of forty years—continued to fix the supreme court of the District of Columbia as a tribunal established under Article III, and protected its judges by the Constitution. The rule that the contemporaneous construction of a statute by those charged with its execution should not be disregarded except for cogent reasons, and unless it be clear that such construction is erroneous, applies with even greater force in the construction of a provision of the Constitution so long and continuously acted upon by the two co-ordinate departments of the Government as the legislative and executive. The acquiescence of Congress and the Executive, for a long time, by which the rights of parties have been determined and adjudged for many years, do not make constitutional that which is unconstitutional; but to say the least, the ambiguity and doubt are too great for us to say that the interpretaion which recognizes the supreme court of the District of Columbia as one of the inferior courts created by Article III of the Constitution is erroneous.

14 The District of Columbia had been subject to the Constitution while it was a part of the territory of those States which ceded it to the Federal Government. The Constitution atached to it in the beginning and continued to attach to the District after the cession. The terms of the Constitution were over the District irre-

vocably. The cession of the District relinquished the authority of the States, but did not take it out of the United States. "Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants it would have been void. If done after the District was created it would have been equally void." *Downes v. Bidwell*, 182 U. S. R., 244, 261.)

We can not believe that the relinquishment by the States to the United States of the 10 miles square for a permanent seat of government deprived Congress of the constitutional right to continue in the District some judicial tribunal which should have and exercise some part of the judicial power conferred by Article III.

We are not unmindful that the constitutional question considered is perhaps not necessarily involved in the determination of the issues presented, and that like all other courts we might well ignore the determination of anything which seems to be merely academic. But the parties have presented the case upon the theory that the proposition considered is in issue and have invited its determination; and as the question of constitutional construction underlies the whole case, we have viewed the proposition as not entirely in the abstract. Thus, we take the record as presented, inasmuch as without reference to our view of the matter the Supreme Court will deal with the issues on appeal in its own way.

The recovery of the amount of salary claimed presents a more serious question, notwithstanding the views announced respecting the character and tenure of the judges affected. The temporary character of the legislation from year to year in providing varying compensation and reserving or implying on the face of the annual appropriations for the payment of salaries the right to change the amount for another and subsequent fiscal year, and the failure in the one piece of permanent legislation to provide a higher salary beyond the year than that payable to the retired judge at the time of his resignation, creates the real difficulty.

The act of June 1, 1866 (14 Stats., 44), fixed the compensation of the chief justice at $4,500 per annum, and of the associate judges at $4,000 each from and after the passage of the act. Thereafter appropriations were made in the legislative, executive, and judicial appropriation acts for salaries as fixed by the act of 1866 for each fiscal year up to and including the fiscal year ending June 30, 1891. These appropriations provided for another associate justice, created by the act of June 21, 1870 (16 Stats., 160), and yet another associate justice authorized to be appointed by the act of February 25, 1879 (20 Stats., 320).

The appropriation act for the fiscal year ending June 30, 1892 (26 Stats., 908, 947), contains the following provision: "For salary of the chief justice of the supreme court of the District of Columbia and the five associate justices at the rate of five thousand dollars per annum each, thirty thousand dollars." The enacting clause of this act provided that the various sums appropriated were "in full compensa-

tion for the service" of that fiscal year; and section 4 of the same act provided "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed." (*Ib.*, 948.)

15 The appropriation act for the fiscal year ending June 30, 1893 (27 Stat., 183, 223), provided "for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, twenty-four thousand five hundred dollars." The enacting clause of this statute provided that the sum so appropriated was "in full compensation for the service" of the fiscal year; and the last section of the act provided "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed" (*ib.*, 223). The sum so appropriated was the amount which had been fixed by law for the salaries of these six judges until the enactment of the appropriation act for the fiscal year ending June 30, 1892. Thus, during the fiscal year ending June 30, 1892, plaintiff's intestate was paid a salary at the rate of $5,000 a year, as provided by the appropriation act for that fiscal year. For the next succeeding fiscal year, ending June 30, 1893, he was paid a salary at the rate of $4,000 a year, as provided by the appropriation act for that year; and as he resigned from the bench on December 1 of the same fiscal year he was paid a salary at that rate until the time of his decease, pursuant to the provisions of section 714 of the Revised Statutes.

Under and act entitled "An act to establish a court of appeals for the District of Columbia," approved February 9, 1893, the salaries of the justices of the supreme court of the District of Columbia were increased to $5,000 each, payable quarterly if necessary. (27 Stats., 436.)

No provision for an increased amount of salary for judges who had retired was made by the act of February 9, 1893.

The legislative, executive, and judicial act for the fiscal year ending June 30, 1894, (27 Stats., 675, 714), appropriated "for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, thirty thousand five hundred dollars. One-half of the foregoing amounts * * * shall be paid from the revenues of the District of Columbia." The enacting clause of this act likewise provided that this appropriation was made "in full compensation" for the service of the fiscal year, and the last section repealed all acts or parts of acts inconsistent or in conflict with any of its provisions.

The appropriation act for the fiscal year ending June 30, 1895 (28 Stats., 162, 204), also contained the like enacting clause and repealing section, and appropriated as provided in the act of June 30, 1894. Thereafter like appropriations were made annually in the same terms and amounts with like enacting clauses and repealing sections. The deficiency appropriation act of March 2, 1895 (28 Stats., 843, 851), contained a provision "to pay the chief justice and five associate justices of the supreme court of the District of Columbia the difference between the rate of compensation received by them

and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three, four thousand one hundred and fifty-five dollars and forty-seven cents, or as much thereof as may be necessary." Pursuant to this appropriation plaintiff's intestate was paid in April, 1895, the sum of $415.80 for that part of the fiscal year 1893 during which he held the commission of associate justice of the supreme court of the District of Columbia, and out of the remainder of the appropriation the chief justice and the other associate justices who held commissions during the whole of the year were paid sums which, when added to the salaries appropriated for them in the regular appropriation act for the year, amounted to $5,000 for the chief justice and $5,000 for each associate justice who was in office when claimant's decedent resigned and a proportionate amount was paid to his successor in office.

The appropriations for the fiscal year ending June 30, 1893—the year of Judge James's retirement—did not fix a definite salary beyond that year. The annual sums appropriated were couched in language indicating that Congress meant to keep control of the amount of salaries for judges of the supreme court of the District of Columbia from year to year. The phraseology employed to accomplish this end may or may not have been intended to avoid a constitutional objection to the diminution of salary after being permanently increased. But there was no such permanent increase of salary during the incumbency of the deceased judge as to entitle him to claim the compensation throughout his retirement given by the appropriation act for the fiscal year ending June 30, 1892. The 14th section of the act of February 9, 1893 (27 Stats., 436, *ante*), did not increase the salary which by law was payable at the time of the resignation, from which it follows that plaintiff is not entitled to recover. Accordingly, the petition must be dismissed.

16 VII.—*Judgment of the Court.*

No. 21959.

HARRIET T. JAMES, Adm'r of Charles P. James, Dec'd,
vs.
UNITED STATES.

At a Court of Claims held in the city of Washington on the 25th day of May 1903 judgment was entered in the above-entitled cause as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge and decree that the petition of Harriet T. James administratrix of Charles P. James deceased, be and the same is hereby dismissed.

BY THE COURT.

17 VIII.—*Application for and Allowance of Appeal.*

No. 21959.

HARRIET T. JAMES, Adm'r of Charles P. James, Dec'd,
vs.
UNITED STATES.

Comes now the above-named claimant, by her attorney, and moves the court to allow an appeal herein to the Supreme Court of the United States from the judgment in this case, entered May 25, 1903, dismissing claimant's petition.

A. A. HOEHLING, JR.
Attorney for Claimant.

Filed August 10, 1903.

MARCH 23, 1905.

Ordered that the appeal be allowed as prayed for.

BY THE COURT.

18 Court of Claims.

No. 21959.

HARRIET T. JAMES, Administratrix of Charles P. James, Deceased,
vs.
UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 27th day of March 1905.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

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OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

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For Appellant.

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STATEMENT.

This is an appeal from the judgment of the Court of Claims dismissing the petition of the appellant, who sought to recover the difference between what was actually paid her intestate, during his retirement as an associate judge of the supreme court of the District of Columbia, and what was, as claimed by her, by law payable to him for that period. The claim was based on the act of April 10, 1869 (16 Stat., 45), being section 714, R. S. U. S., which is as follows:

> "When any judge of any court of the United States resigns his office after having held his commission as such at least ten years and having attained the age of seventy years, he shall during the residue of his natural life receive the same salary which was by law payable to him at the time of his resignation."

The facts found below were as follows:

First. Claimant is administratrix of Charles P. James, late a citizen of the United States and a resident of Washington, D. C., who departed this life August 9, 1899.

Second. Claimant's intestate was at one time an associate judge of the supreme court of the District of Columbia, which office he resigned December 1, 1892, after having held his commission more than ten years, and having attained the age of 74 years.

Third. His salary at the date of his appointment was $4,000 per annum, at which rate he was paid until July 1, 1891.

Fourth. From July 1, 1891, to June 30, 1892, his salary was $5,000 per annum, and from June 30, 1892, to December 1, 1892, he was paid at the same rate.

Fifth. On his retirement he was paid, during the residue of his natural life, at the rate of only $4,000 per annum.

Sixth. The period embraced in the claim herein is from December 1, 1892, to August 9, 1899, being six years, eight months, and eight days, at the rate of $1,000 per annum, aggregating the sum of $6,688.90.

On these findings of fact the court decided as conclusion of law that the petitioner could not recover and dismissed her petition, holding that while Judge James' salary had been increased during his continuance in office, and that while he was paid from the date of such increase for the residue of his active judicial service at the increased rate, such increase was but a temporary provision of law and not in force at the date of his resignation.

Assignment of Errors.

1. The court erred in holding that the salary which was by law payable to Judge James at the date of his resignation was four thousand dollars per annum.

2. The court erred in not holding that the salary which was by law payable to Judge James at the date of his resignation was five thousand dollars per annum.

3. The court erred in dismissing the petition of the appellant.

4. The court erred in not awarding judgment in appellant's favor for the sum of six thousand six hundred and eighty-eight dollars and ninety cents, being the difference between the amount actually paid him during the period of his retirement and the amount which was by law payable to him for that time.

ARGUMENT.

The single question in this case is, What was the salary which was by law payable to Judge James at the date of his resignation, December 1, 1892? It is not what amount of money had been appropriated for the payment of the judges of the court, but what was the sum which by law he was entitled to receive at that time, what was justly due him. Appellant contends that five thousand dollars per annum was the legal salary, while the Government insists that four thousand dollars was the correct amount. And appellant's propositions are (1) that Congress, by the act of March 3, 1891 (26 S. L., p. 947), intended to increase and actually did increase the salaries of the judges of the supreme court of the District of Columbia to five thousand dollars per annum each; (2) that Congress did not intend thereafter to diminish and did not diminish the salary thus increased by that act; and (3) that Congress could not thereafter constitutionally diminish the salary of any judge whose salary had been thus increased during his continuance in office.

If Congress did increase the salary in 1891, whether this were also the salary in 1892, may depend upon either the intention of Congress, as evidenced by all of its legislation on the subject, or the constitutional power of Congress to diminish a judicial compensation during the continuance of the judge in office. If Congress did not intend to diminish, it is unnecessary to inquire whether Congress had the constitutional power to diminish. But if Congress had not the constitutional power to diminish, that is a consideration in aid of ascertaining congressional intent, as well as a ground for positive relief against an intention unfavorable to appellant's claim for relief.

PROPOSITION .

Congress intended by the act of March 3, 1891 (26 S. L., p. 947), to increase and did actually increase the salary of the judges of the supreme court of the District of Columbia to five thousand dollars per annum each.

This act was the legislative, executive, and judicial appropriation act for the fiscal year ending on June 30, 1892, and uses the following language in making provision for the court of which Judge James was then a member:

> "For salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges *at the rate of five thonsand dollars per annum each*, thirty thousand dollars."

For the preceding quarter of a century, since 1866, the salary of the chief justice had been $4,500 and of the associate judges $4,000 each per annum, and the stereotyped appropriation for salaries was simply to appropriate a gross sum, the aggregate amount of the salaries (*e. g.*, for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, $24,500), leaving the

apportionment or the amount each should receive to the general law.

12 S. L., 693, 762; 13 S. L., 158, 457; 14 S. L., 55, 205, 455; 15 S. L., 109, 301; 16 S. L., 249, 493; 17 S. L., 81, 507; 18 S. L., 108, 369; 19 S. L., 168, 318; 20 S. L., 205; 21 S. L., 236, 412; 22 S. L., 254, 563; 23 S. L., 193, 452; 24 S. L., 208, 631; 25 S. L., 294, 744; 26 S. L., 267.

All of these acts simply appropriate a certain gross sum for the court, the division among the individual members being effected by the general act fixing the salary of each at a certain figure.

But in the act of March 3, 1891, the language used specifies the sum each is to receive, "at the rate of $5,000 per annum each."

By virtue of this enactment the salary of Judge James, theretofore $4,000 per annum, was increased to the sum of $5,000, and this amount he received.

Obviously, by this act more was done than to simply appropriate for the payment of a salary, the amount of which had been previously fixed.

Such, indeed, had been the sole function of all prior appropriation acts, every one of which from the creation of the court had the one object, and the only object, of appropriating a certain gross sum, the sum of all the salaries.

This 1891 act did more; it declared what each judge was to receive, in what amount each was to be paid, at what rate per annum, and appropriated the gross sum necessary for that purpose. It inserts, *ex industria*, the words "at the rate of $5,000 per annum each." Had they been omitted and the appropriation been simply of the gross amount, viz., $30,000, the question might have arisen whether this were not merely an overappropriation.

But with the insertion of these words, "at the rate of $5,000 per annum each," clearly the intention of Congress

was that each should be paid a salary of $5,000 per annum. That such was the intention was below, and probably here will be, admitted.

> "An appropriation act is *per se* nothing more than "the legislative authorization prescribed by the Con- "stitution that money may be paid out at the Treas- "ury. Frequently there is coupled with an appro- "priation a legislative indication that the designated "amount shall be paid to a person or class of persons, "and from such an appropriation a statutory right "arises upon which an action may be maintained. "Occasionally an appropriation act goes still further, "and expressly or by necessary implication changes "pre-existing law so as permanently to increase or "diminish the compensation of an officer, agent, or "employee of the Government."
>
> Campagna *vs.* U. S., 26 Ct. Cl., 317.

Proposition II.

Congress did not intend to diminish and did not diminish the salary fixed by the act of 1891.

In the appropriation act for the succeeding fiscal year Congress returned to the old form of expression, "for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, twenty-four thousand five hundred dollars."

Act July 16, 1892 (27 S. L., 223).

In the enacting clause of this act, as of its predecessor, it was provided that the various sums appropriated were "in full compensation for the service" of that fiscal year; and in its concluding clause, as in that of its predecessor, it was provided "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed." These forms of enacting and repealing clauses are common to all appropriation acts of this character.

By an act of February 9, 1893 (27 S. L., 434), taking effect April 3, 1893, Congress created a Court of Appeals for the District of Columbia. Its effect on the supreme court of the District of Columbia was to relieve the latter of a very considerable portion of its labor, the review in general term by two or more judges of proceedings in special term before a single judge, and this act, in section 14 provided that "the justices of the supreme court of the District of Columbia shall hereafter receive an annual salary of five thousand dollars."

This act, it will be observed, was passed in the same fiscal year in which Judge James resigned and about two months after his resignation. At the time of its passage the appropriation act of July 16, 1892, was in force, and there was by it no provision made for the payment of the salaries of the judges of the supreme court of the District of Columbia required by the Court of Appeals act. Congress, therefore, in an act of March 3, 1893 (27 S. L., 653), appropriated an additional amount of $2,000 for salaries of these judges from the date when the Court of Appeals act became effective, April 3, 1893, to the end of the then fiscal year, July 1, 1893.

Finally, by an act of March 2, 1895 (28 S. L., 851), Congress, in an act "to supply deficiencies in the appropriations for the fiscal year ending June 30, 1893, and for prior years," appropriated "to pay the chief justice and five associate justices of the supreme court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three."

It will be argued for Government that Congress intended by the act of 1892, *supra*, to reduce the salary for the then fiscal year to what it had been prior to the act of March 31, 1891, because it appropriated "in full compensation for the service" of that year and repealed any inconsistent or conflicting act. It may be urged, also, that such intention on the part of Congress is strengthened

by the fact that in the Court of Appeals act of February 9, 1893, it was provided that the judges should thereafter receive a salary of $5,000, and that in the act of March 3, 1893, *supra*, appropriation was made to pay the judges at this rate only from April 3, 1893, to July 1, 1893.

The error of this argument lies in the assumption that the act of 1891 was repealed by that of 1892, and the re-enforcement from the prospective operation of the Court of Appeals act and from the appropriation of the act of March 3, 1893, is weakened when the act of March 2, 1895, is considered. Why should Congress in this last act appropriate to pay the difference between the rate of compensation received by the judges in the fiscal year 1893 and five thousand dollars per annum? Was it a gift or the payment of a debt? Did Congress raise the salary in 1891 for a year, reduce it in 1892 for ten months of the fiscal year, raise it again for the remaining two months, and, contemporaneously with the last increase, lighten the court of much of its labor by creating a new court? And did Congress three years later repent of its capriciousness and make a present to the judges with whose compensation it had juggled? Such experimentation is not to be imputed to Congress if there be a fair theory of consistent action deducible from any possible principles of construction.

Appellant submits, therefore, that the act of 1891 is not repealed, in so far as it increases the salary to five thousand dollars *per annum*, by the act of 1892, which simply appropriates a sum insufficient for the payment of that amount; that the provision of the Court of Appeals act must be held declaratory of what the judges of the supreme court of the District of Columbia were to receive when the new and additional court came into existence, and that the act of March 2, 1895, was of the well-recognized class of general deficiency acts whose expressed function it is to supply deficiencies in appropriations not only for the next preceding fiscal year, but "for prior years," and that it was a payment, though

a belated payment, of the amounts which were payable by law at the time of Judge James' resignation.

Let it be remembered that the act of 1891 had two objects—effected two results; one was to raise the salary to $5,000, the other to authorize its payment for the ensuing fiscal year. It concluded with the usual clause repealing all inconsistent or conflicting acts or parts of acts.

Any act or any part of an act, therefore, which was in conflict or inconsistent with a judicial salary of $5,000 per annum was inoperative and repealed. There could not be at one and the same time an act giving a $4,000 salary and an act giving a $5,000 salary without a conflict or inconsistency, so that the act of June 1, 1866, which originally fixed the lesser sum, was repealed.

The general act of 1866 being repealed, it could only be revived by being re-enacted or by a repeal of the act of 1891, which had repealed it. Admittedly it was not revived by any specific re-enactment; wherefore it is necessary to consider how far the act of 1891 was repealed.

If repealed at all, it was by the act of 1892, but any repeal by that act must be an implied repeal. It must be an implied repeal, because there is no express repeal of any act. Any act inconsistent or in conflict with it would be construed to be repealed, independently of the formal concluding clause of repeal. For a statute to say that any prior statute inconsistent or in conflict with it is to be repealed, expressly repeals nothing and is supererogatory. The question of inconsistency or conflict is one of construction.

Now, the act of 1892 authorized the payment from the Treasury of the United States of a definite sum of money—$24,500. It said nothing as to the rate of compensation. It was nothing more than the legislative authorization prescribed by the Constitution that money be paid out at the Treasury. In the case of the permanent officers, whose salaries are appropriated for in the legislative, executive, and judicial appropriation acts, the amount or rate of salary is

usually fixed by a general law, not by the act itself. The ordinary purpose of the act is to appropriate, to set apart so much as is necessary for certain fixed charges previously ascertained, not to determine or ascertain the amount or rate of charge.

But in this lies the peculiarity of the act of 1891; it fixed the rate and appropriated for its payment. It had two purposes—to raise the salary and to appropriate money to pay it.

Now, the act of 1892 simply appropriates; it does not in terms, at least, declare what the salary is. It appropriates for salaries, but is silent as to the rate or amount. It professes in its enacting clause to be a complete appropriation for the service of the fiscal year, but it appropriates as if the amount had been already fixed. It can hardly be said, therefore, to have had the twofold purpose of the act of 1891.

There is nothing inconsistent in a law fixing the amount of a salary and an appropriation of a sum less than this amount. There is nothing inconsistent in a law fixing a salary and a total failure to appropriate for its payment. A failure today for any cause on the part of Congress to make appropriation for the payment of the salaries of permanent legislative, executive, and judicial officers of the Government would not, in law, either abolish the officers or extinguish their right to be paid. If, therefore, there be no necessary legal inconsistency between an act fixing a salary at a certain sum, and an act appropriating a less sum, the two may, in a legal sense, coexist. So that to work a repeal of the act of 1891 of the substantive feature of a general salary, by the act of 1892, it must appear that the act of 1892 contemplated and covered the same ground, had the same twofold object, and made different, inconsistent, and conflicting provisions.

It is claimed, by Government, to do this by the use of the words in the enacting clause "in full compensation" for the service of the fiscal year. If the appropriation, it is argued,

is expressed by Congress to be in full compensation, then, by the ruling of this court in U. S. *vs.* Fisher, 109 U. S., 143, the intention to reduce is conclusively established.

Unquestionably this court decided in Fisher's case that, Congress having appropriated, in full compensation for the service of a territorial judge for a fiscal year, an amount less than the salary fixed by an earlier general act, the earlier act was suspended, and the smaller sum was all that the claimant could have. The reason given was that when Congress said the smaller sum appropriated should be in full compensation, the court had no power to say that it should not be in full compensation. There was, in the view of the court, no ambiquity and no room for construction; and to emphasize this the decision in U. S. *vs.* Langston, 118 U. S., 389, was made to turn on the absence of the words "in full compensation." There this court held that when Congress appropriated for particular fiscal years a less amount for the minister resident at Haiti than the salary fixed, without limitation as to time, by an earlier general act, the minister would be entitled to and could recover, for those particular years, the larger salary fixed by the earlier act. This court distinguished the case from Fisher's case by the absence from the appropriation acts affecting Langston of the words "in full compensation," which were contained in the acts under consideration in Fisher's case.

But the case at bar is distinguishable from both of these cases, in that Congress has, by the act of 1895, *supra*, conclusively shown that the appropriation of 1892 was not "in full compensation."

All appropriation acts for executive, legislative, and judicial expenses, for a quarter of a century at least, purport to appropriate "in full compensation for the service of the fiscal year," yet to every one, it is believed, there is the invariable sequence of an act appropriating for deficiencies.

An act to supply deficiencies in the appropriation for the next preceding fiscal year and for prior years, is as fixed an

event of congressional practice as the general appropriation act, whose deficiencies are supplied against its declaration that it intends to appropriate in full compensation for the service of the ensuing year.

The principle of construction, properly invoked here, is that—

> "if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning and will govern the construction of the first statute."
>
> U. S. *vs.* Freeman, 3 How., 565.

In determining the intention of Congress every act may be examined. The act of March 3, 1891, which raised the salary to $5,000, was in line with a general increase of judicial salaries of inferior courts, as is evidenced by the fact that a few days prior to its passage, Congress had increased the salary of every district judge of the United States to the same amount (act Feb'y 24, 1891, 26 S. L., 783).

There has never been an instance of reduction of judicial salary in the District of Columbia from its creation, as the permanent seat of Government, to the present time, unless the short-lived and changeable policy of the act of 1892, disclaimed by Congress in the act of 1895, is to be construed as being an unreasonable and inexplicable exception.

Proposition III.

Congress could not, after increasing the salary of Judge James, diminish it during his continuance in office.

It is now to be submitted that if this court should hold that the increase of the act of 1891 was not intended as a permanent increase of salary it was, nevertheless, not within the power of Congress, after increasing it for one year, to

diminish it thereafter. The ground of this contention is that Judge James was protected by the constitutional guaranty of judicial independence. This may be met by the rejoinder (*a*) that to reduce a judicial salary to the amount which it was when the judge took office is not a diminution in the sense of the Constitution, or (*b*) it may be contended that the supreme court of the District of Columbia is not one of the courts contemplated by the first section of the third article.

It is proposed to consider these objections in their order.

(*a*) The constitutional provision is:

> * * * "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."
>
> Const., art. III, sec. 1.

To receive at stated times a compensation is to be regularly paid.

To receive at stated times a compensation which shall not be diminished, is to be regularly paid and to be protected against any reduction of pay.

A compensation is diminished when it is made less than it is, though equal to what it may have once been.

If my salary be now five thousand dollars per annum and my employer tells me that next year it will be but four thousand dollars, it is none the less a diminution of my salary, though he justify his economy by the fact that it was some years ago but four thousand dollars.

Diminution is the making something less than it is, less than what it has grown to be.

After diminution, that which has been diminished may be equal to what it at some earlier time had been, but it has been diminished.

In all, or nearly all of the plans proposed in the conven-

tion, there was a prohibition against increase, as well as diminution.

Elliott's Debates, 1 ed., vol. 1, pp. 149, 176, 182.

Said Mr. Madison:

> "I wished myself to insert a restraint on the augmentation as well as the diminution of their compensation, and supported it in the convention. But I was overruled. I must state the reasons which were urged. They had great weight."
>
> Elliott's Debates, Virginia, vol. 3, p. 537.

The prohibition against increase was rejected.

The power to increase is allowed; it impliedly exists. A sum at one time sufficient, later might be inadequate. The amount, initial or subsequent, is left to Congress; but it must be regularly paid, and there must be no diminution during continuance in office.

In Commonwealth *ex rel.* Hepburn *vs.* Mann, 5 Watts & Serg., 403, the case was thus: Hepburn was appointed president judge of the ninth judicial circuit of Pennsylvania March 5, 1839, when the salary was $1,600. By an act of July 19, 1839, the salary was increased to $2,000. By an act of January 14, 1843, the act of July 19, 1839, was repealed. Hepburn, as relator, brought *mandamus* against Mann, State treasurer, for payment of salary at the greater rate, and the repeal, *inter alia*, was set up by Mann in his answer, to which the relator demurred. The constitutional provision of Pennsylvania was "the judges of the supreme court and the presidents of the several courts of common pleas shall, at stated times, receive for their services an adequate compensation to be fixed by law, which shall not be diminished during their continuance in office."

Note that when the respondent took office the salary was $1,600; that it was increased to $2,000; that it was then reduced to the original $1,600. The constitutionality of this reduction was squarely presented to the court and by it held

to be violative of the provision cited, *mandamus* being made peremptory. The distinction was sought to be drawn between a reduction of initial salary and a reduction of a subsequently increased salary to the initial amount. The opinion was that the same reasons, which are the familiar ones for judicial independence under the Federal Constitution, applied with equal force to either reduction.

It was suggested, too, that the power to increase might be abused for legislative favorites, which subsequent legislatures could not correct if they were without power to reduce the increased to the original amount. To this the court say:

> "But this was an evil, if it be one, which must have been foreseen, and it appears did not alarm the convention, nor has subsequent experience evinced the necessity of any such precaution; and at any rate, they were too wise to attempt to avoid a contingent evil which from the nature of things would not often happen, by running into another, in their estimation at least, of such transcendent importance and magnitude, jeopardizing the independence and integrity of a co-ordinate branch of the Government. It must readily occur, on the slightest reflection, that if the convention intended to give the clause in question the limited signification contended for, how easy it would have been to put that intention beyond the reach of doubt or cavil, by a slight alteration of the language used. By superadding a few words even, which would not have destroyed the beauty of the language, all difficulty would have been effectually prevented. But we cannot attribute this intention to those great men on a doubtful inference, inasmuch as in our judgment it would materially impair, if not totally destroy the value of the provision itself. It would be suicidal to the object so steadily kept in view by the framers of the Constitution."

(*b.*) Finally, it is submitted that the Supreme Court of the District of Columbia is an inferior court of the United States,

within the meaning of the Constitution, in the sense that the compensation of one of its judges cannot be diminished during his continuance in office.

It was created by the act of March 3, 1863 (12 S. L., p. 762). By the third section of that act the court and the judges thereof possessed the same powers and exercised the same jurisdiction as were possessed and exercised by the circuit court of the District of Columbia.

The circuit court of the District of Columbia was created by the act of February 27, 1801 (2 S. L., 103), consisted of a chief and two assistant judges, and the court and the judges thereof had all the powers vested by law in the circuit courts and the judges of the circuit courts of the United States.

At the date of the passage of the act of February 27, 1801, the law which vested the powers in the circuit courts of the United States was the act of February 13, 1801 (2 S. L., 89), by the eleventh section of which the jurisdiction conferred is as follows:

> "Cognizance of all crimes and offenses cognizant under the authority of the United States and committed within their respective districts or upon the high seas; and also of all cases in law or equity, arising under the Constitution and laws of the United States, and treaties made, or which shall be made under their authority; and also of all actions or suits of a civil nature, at common law, or in equity, where the United States shall be plaintiffs or complainants; and also of all seizures on land or water and all penalties or forfeitures made, arising or accruing under the laws of the United States; which cognizance of all penalties and forfeitures shall be exclusively of the State courts in the said circuit courts, where the offenses by which the penalty or forfeiture is incurred shall have been committed within fifty miles of the place of holding the said courts; *and also of all actions or suits, matters or things cognizable by the judiciary authority of the United States under and by virtue of the Constitution thereof,*" *etc.*

In the case of Kendall *vs.* The United States (12 Pet., 524), which came to this court on writ of error from the circuit court of the District, Mr. Justice Thompson, in delivering the opinion of the court, speaks of the lower court as the circuit court of the United States for the District of Columbia, and in the course of his opinion considers the powers and jurisdiction of that court. The main question involved in that case was whether the circuit court of the District of Columbia had power to issue a writ of *mandamus* against the Postmaster General. The court had been considering earlier cases of *mandamus* in which the writ had been refused, but the court held that this was because the power to issue the writ had not been communicated by law to the circuit courts of the United States; that it was a dormant power not yet called into action and vested in those courts, and then Mr. Justice Thompson in speaking for the court, goes on to say:

> "It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this District is vested with broader powers and jurisdiction in this respect than is vested in the circuit courts of the United States in the several States, then the *mandamus* in the present case was issued without authority. But in considering this question it must be borne in mind that the only ground upon which the court placed its decision was that the constitutional judicial powers on this subject had not been imparted to those courts. * * * But let us examine the act of Congress of the 27th of February, 1801, concerning the District of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out. And it is proper preliminarily to remark, that under the Constitution of the United States, and the cessions made by the States of Virginia and Maryland, the exercise of exclusive legislation in all cases whatsoever is given to Congress. And it is a sound principle that in every well organized government the judicial power should be co-extensive with the legislative, so far at least as private rights are to be

enforced by judicial proceedings. There is in this District no division of powers between the general and State governments. Congress has the entire control over the District for every purpose of government; and it is reasonable to suppose that, in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court here is the highest court of original jurisdiction; and if the power to issue a *mandamus* in a case like the present exists in any court, it is vested in that court. * * * Thus far the power of the circuit court to issue the writ of *mandamas*, has been considered as derived under the 1st section of the act of February 27th, 1801. But the 3d and 5th sections are to be taken into consideration in deciding this question. The 3d section, so far as it relates to the present inquiry, declares 'that there shall be a court in this District which shall be called the circuit court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit court and the judges of the circuit courts of the United States.' And the 5th section declares 'that the said courts shall have cognizance of all cases in law and equity between parties, both or either of which shall be resident or be found within the District.' Some criticisms have been made at the bar between the use of the terms power and cognizance as employed in those sections. It is not perceived how such distinction, if any exists, can affect the construction of this law. * * * Power must include jurisdiction, which is generally used in the exercise of that power in courts of justice. But power as used in the Constitution would seem to embrace both. * * * And the power in the court below to exercise this jurisdiction, we think, results irresistibly from the third section of the act of the 27th of February, 1801, which declares that the said court and the judges thereof, shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States. The question here is what circuit courts are referred to.

By the act of the 13th of February, 1801, the circuit courts established under the Judiciary Act of 1789, were abolished; and no other circuit courts were in existence except those established by the act of the 13th of February, 1801. * * * The reference is to the powers of law vested in the circuit courts. The question necessarily arises, what law? The question admits of no other answer than that it must be some existing law by which powers are vested and not a law which had been repealed. And there was no other law in force vesting powers in circuit courts, except the law of the 13th of February, 1801. And the repeal of this law fifteen months afterwards, and after the court of this District had been organized and gone into operation, under the act of 27th of February, 1801, could not, in any manner, affect that law any further than was provided by the repealing act. To what law was the circuit court of this District to look for the powers vested in the circuit courts of the United States, by which the court was to be governed during the time the act of the 13th of February was in force? Certainly to none other than that act. And whether the time was longer or shorter before that law was repealed, could make no difference." Kendall *vs.* U. S. *supra.*

This decision expressly says that authority to issue a writ of *mandamus* to an officer of the United States is within the scope of the judicial powers of the United States under the Constitution. The question clearly was whether that power had been communicated to the circuit courts or whether, as to them, it was a dormant power, not yet called into action and not yet vested in those courts.

Then the court reasons that, unless the circuit court of the District of Columbia were vested with broader powers and jurisdiction than the circuit courts of the United States, that court in like manner would have no authority to issue the writ.

The significance of this decision, in its application to the case at bar, is that it finds in the circuit court of the District

of Columbia not only the same powers as were possessed by the circuit courts of the United States, but also an additional and further power which is within the scope of the judicial power of the United States under the Constitution. That is to say, the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish. The judicial power shall extend to certain subjects; it may be communicated to certain courts, or it may be a dormant power not yet called into action. It has been communicated, it is an awakened power, it is called into action in the circuit court of the District of Columbia.

It is pertinent to note that in the 21st section of the act of February 13, 1801, a new district was established in Maryland and Virginia, which included the District of Columbia, and was called the district of Potomac, for which a district court was to be held at Alexandria by the district judge of the district of Maryland.

And by the 7th section of an act of March 3, 1801 (2 S. L., p. 124), it was provided that the chief judge of the District of Columbia should hold the district court of the United States in and for the district of Potomac, and should have all the powers and duties then had by the district judges of the United States within their respective districts.

So, then, it appears that there was at this early day in the District of Columbia a separate circuit court for that District, having not only the judicial powers vested in the then existing circuit courts of the United States, but even greater powers, which it would have been competent for Congress to have vested in the circuit courts of the United States under the Constitution, but which Congress had not seen fit to do. The act of February 13, 1801, was repealed by the act of April 29, 1802 (2 S. L., p. 132), but this repeal had no effect whatever on the act of February 24, 1801, which created the circuit court for the District of Columbia.

Kendall *vs.* United States, *supra*.

It is well known that one of the first points of attack by the incoming Jefferson administration was this very judiciary act of February 13, 1801, passed in the last days of Mr. Adams' administration, but the manner in which the circuit court of the District of Columbia obtained its jurisdiction, viz., by reference to the act of 1801, saved the jurisdiction of this court.

It is hardly necessary here to trace further the history of legislation affecting the judiciary in the District of Columbia during the period between the act of February 13, 1801, and the act of March 3, 1863, for the present purpose is simply to show that the old circuit court of the District of Columbia was made a depository of a part of the judicial power of the United States, mentioned in the Constitution. There was a separate criminal court, a separate orphans' court, sundry justices of the peace, all existing under acts of Congress; but the significant fact is that the circuit court of the District of Columbia, as the predecessor of the supreme court of the District of Columbia, had jurisdiction and power invested in it under the Constitution, which descended upon the supreme court of the District of Columbia.

It is undoubtedly true that the old circuit court was abolished by the act of March 3, 1863, which was a civil war act. The existence of the circuit court of the District of Columbia as a constitutional court was not then seriously questioned, but reorganization was urged, because it was alleged to be a judicial patchwork of sixty years. To this it was replied by the advocates of the then existing system that it might be reorganized without turning out the judges; that an additional judge might be created if the number were insufficient; that the incumbents could only be removed by impeachment. But to this the rejoinder was made by those who desired the overthrow of the court, that the power which could create could destroy, and that as to the three judges then in office one of them was superannuated

another was suspected of secession sympathies, and the third might be appointed to the new court!

Congressional Globe, February 18–20, March 3, 1863.

It is to be remembered that judges of the courts in the District of Columbia have always held office during good behavior, that all the acts creating them so specify their tenure to be, and the Supreme Court of the United States has always exercised appellate jurisdiction over them. So that the real question at this stage of the case is, what is the test of a constitutional court? Given a court in which is vested any of the judicial power of the United States, ordained and established by Congress, inferior to the Supreme Court of the United States, with judges who hold their office during good behavior, is this or not a court protected by the Constitution?

Is the test to be made by locality? Is it to be determined by the place in which the court sits? If it sits in the confines of a State is it constitutional, if in the limits of the District of Columbia, is it not constitutional?

As a question of constitutional power all the inferior courts of the United States for the several States, except in criminal prosecutions, might be held in the District of Columbia itself. It would be inconvenient to the point of revolution, but the power exists.

Must a court to be constitutional have some or all, but only some or all of the jurisdictional subjects to which the judicial power of the United States under the Constitution extends? No; but it must have only those subjects of jurisdiction which can constitutionally be given to it.

The court in the District of Columbia is none the less constitutional because it has a broader jurisdiction than a Federal court in the States.

It has a broader jurisdiction here because it is the resultant of two constitutional powers, one "to constitute tribunals

inferior to the Supreme Court;" another "to exercise exclusive legislation over such District."

Exclusive legislation does not mean absolute legislation. It does not imply subordination of the judicial to the legislative power. The Constitution is in force in the District of Columbia. Its threefold division of power is here. Before the District of Columbia was created its component parts were under Federal judiciary and State judiciary. After it was created Federal and State judiciary were merged into one tribunal.

Instead of two tribunals, one passing on questions which might be called National or Federal, the other, on those analogous to State or municipal concerns, the whole jurisdiction was put in one court, and constitutionally put in one court.

There is no analogy, or at least a not very controlling one, between the courts created by Congress in the Territories and the courts of the District of Columbia.

Territory implies, *ex vi termini*, a temporary condition; the seat of government implies permanency.

A Territory is governed by one clause of the Constitution; the seat of government under another. The very purposes and condition of the cession by Maryland and Virginia to the United States, and the acceptance of the ceded land by the United States, was the *permanency* of the seat of government.

Territory means inchoate statehood; with the seat of government statehood is a thing of the past.

Territory is the result of war, of treaties, of cession by other sovereignties; the seat of government came in the way expressly marked out by the Constitution from the bodies of two of the States.

> "This District has been a part of the States of Maryland and Virginia. It has been subject to the Constitution and was a part of the United States. The Constitution had attached to it irrevocably.

There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved without, at least, the consent of the Federal and State Governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory, which had been once a part of the United States, ceased to be such by being ceded directly to the Federal Government."

Downes *vs.* Bidwell, 182 U. S., 260.

The District of Columbia is within the meaning of the uniformity clause, and the right of Congress to tax the District does not depend solely on the grant of exclusive jurisdiction.

Loughborough *vs.* Blake, 5 Wheat., 317.

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the District as elsewhere within the United States.

Act Feb. 21, 1871, 34 S. L., p. 426.

A judgment of the supreme court of the District of Columbia is a judgment of a court of the United States. The faith and credit to be given it is not under article 4, section 1, of the Constitution, which is applicable to judgments

of the State courts, but "by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution."

Embry *vs.* Palmer, 107 U. S., 3.

A general law of the United States (sec. 858, R. S.) in relation to competency of witnesses in the courts of the United States is applicable to the courts of the District of Columbia, and this is true, although a law on the same subject specially applicable to the District existed at the same time.

Page *vs.* Burnstine, 102 U. S., 664.

Yet this general law, though held applicable to the District of Columbia, was held inapplicable in the Territories.

Good *vs.* Martin, 95 U. S., 90.

The District of Columbia is within the meaning of section 1014 of the Revised Statutes, providing the method of arrest and the removal of a person charged with an offense against the United States from the district in which he may be found to the district wherein the offense is alleged to have been committed.

Benson *vs.* Henkel, 198 U. S., 1.

The case of American Insurance Co. *vs.* Canter, 1 Pet., 511, turned upon the point whether cases in admiralty and cases arising under the laws and Constitution of the United States were identical; and Chief Justice Marshall, in speaking for the court, held that they were not. In enforcing this view it is that, he says, "they are legislative courts, created in virtue of the general right of sovereignty which exists in the

Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." The fact that the judges held office for four years is stated as conclusively showing that they were not created under the constitutional clause, according to which judges must have life tenure, and that the jurisdiction with which they were invested was not a part of the judicial power defined in the third section of the Constitution. Nowhere is it said that Congress could not have created a constitutional court in the Territories; all that is decided is that Congress had not done so.

If the judicial tenure fixed by Congress is decisive, then the courts of the District of Columbia, whose judges have ever held during behavior, are constitutional and not legislative.

It is submitted that the judgment below should be reversed.

MORGAN H. BEACH,
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For Appellant.

WASHINGTON, D. C., *March* 3, 1906.